Supreme Court, U.S.
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No. 1410

IN THE

# Supreme Court of the United States

October Term, 1970

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CERTAIN SPACE IN THE PROPERTY KNOWN AS THE CHIMES BUILDING, 109 WEST ONONDAGA STREET, SYRACUSE, ONONDAGA COUNTY, STATE OF NEW YORK, ET AL.,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**REPLY BRIEF on Behalf of the Petitioners Walter J. Sampson, Bernard Greenbaum, Abner J. Mesirow and Walter A. Bogeaus, d/b/a Southeastern Industrial District.**

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The Petitioners, Walter J. Sampson, Bernard Greenbaum, Abner J. Mesirow and Walter A. Bogeaus, d/b/a Southeastern Industrial District, in reply to the Opposition Brief of the United States and the Opposition Brief for the Respondent, City Investing Company does hereby state as follows:

## I.

## OPINIONS BELOW

The Opinion of the District Court (Petitioners' Appendix A) is reported at 320 F. Supp. 491. The Opinion of the

Court of Appeals (Petitioners' Appendix B) is reported at 435 F. 2d 872.

## II.

## ARGUMENT

1. From the opposing Briefs Petitioners are only able to discern two cases cited to the Court for the issue in question in issue one, i.e. the authority of the United States to determine at its option whether United States v. Dow, 357 U.S. 17 shall apply to an assignment executed before final adjudication.

At pages 4-5 of the Solicitor General's Brief that authority is cited as follows:

> "The Government may as it did here refrain from invoking the Act's protection. (See McGowan v. Parrish, 237 U.S. 285, 294."

Curiously, the Respondent City Investing Company does not cite or rely on the McGowan case, but, rather in its Brief at Page 7 it states:

> "And it has long been established that the protection of the Statute can be waived by the Government. (Freedman's Savings & Trust Company v. Shepherd, 127 U.S. 494 (1888), at 505-506."

These cases now alleged to be controlling were not relied upon by either the District or the Circuit Court in making their decision, and it now appears that neither the Government nor the Respondent City Investing Company rely upon the authorities cited to this point by the District Court or the Circuit Court. (See Petitioner's Appendix A, Page 22, Opinion of the District Court.)

In a matter of such importance one would expect a more clear-cut line of authorities.

In any event, neither the McGowan nor Freedman's cases (supra) involved a pending condemnation proceeding, as did the Dow case (supra). In each of these cases there was completed prior litigation on the merits, and in the words of the Supreme Court "final adjudication" to and including the United States' Supreme Court on the propriety and basis for payment, terminating in a Final Order of this Court. The role of the Government as an interested party had come to a practical end. (See McGowan at page 295 and Freedman's at page 506.)

Further, in each case the original holder had expressly consented to the jurisdiction of the Court (McGowan, Page 295, and Freedman's, Page 506). 1/

The Court, in Freedman's was careful to state the applicable rule where these events had not occurred, and at page 506 stated:

> "There could not have been any valid transfer or assignment of it in advance of its allowance, which could have been made the basis of a suit by the Assignee against United States, or which would compel the Government to recognize a transfer or assignment. It is, perhaps, also true that, under some circumstances, the Assignor, before the allowance of the claim and the issuing of the warrant may disregard such an assignment altogether."

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1/ Against a claim of invalidity by a mortgagor and trust company, the Court continued on to base its recognition of the assignment on the fact the Government was no longer a rightful party having been "acquitted of any liability in respect to the claim of rent, for its officers have acted in conformity of the directions not only of the original claimant, but of its assignee, Shepherd and of Shepherd's trustees."

In the present case, the amount to be paid had not been determined or finally adjudicated at the time of the assignment, and the role of the Government had not come to an end.

Further, the Assignor asserts and asserted in the proceedings a strenuous objection to payment and questioned both the validity and the nature and the extent of the assignment.

Therefor the McGowan and Freedman's cases do not supply precedent.

It thus appears the Courts below have set sail upon the sea, following authorities no one now seriously urges, without a precedent or chart or compass, and have created a wholly new legal principal without restrictions upon this newly granted authority.

The Anti-Assignment Statute stands as frustrated, and one of its main purposes which was to prevent successful trafficking in claims, has been frustrated. The billions of dollars of the United States monies paid out annually will be without this valuable Congressional safeguard.

This Court has recognized that the Congress looked upon such trafficking as an evil to be avoided at all costs.[2/]

In the interests of the propriety and stability of such immense relationships and in the interest of justice, the Court is requested to grant certiorari.

2. The Solicitor General's Brief at Page 5 states:

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2/ This result is contrary to the holding in Bailey v. United States, 107 U.S. 432, 438, 439 (1888); see also Spofford v. Kirk, 97 U.S. 484, 489-490 (1878); Goodman v. Kniblock, 102 U.S. 556, 560 (1880); Patterson v. United States, Northwestern National Bank of Minneapolis, 354 F. 2d 327, 329 (1965); Banning v. Mints, 367 F. 2d 304, 307, Cert. denied, 386 U.S. 990.

> "The Courts below correctly held that, as a matter of law, such a claim, if it did survive the assignment, was not cognizable in the present proceeding but must be presented to the Court of Claims."

This holding is directly contrary to the holding of the Fifth Circuit in the United States v. Smith, 307 F. 2d 49; quoting United States of America v. McCrory Holding Company, 294 F. 2d 812 at 816, which in turn quoted United States v. Dow (supra) at page 21, 22, where this Court stated:

> "Broadly speaking, the United States may take property pursuant to its power of eminent domain in one of two ways: it can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings under various Acts of Congress providing authority for such takings. Under the first method—physical seizure—no condemnation proceedings are instituted, and the property owner is provided a remedy under the Tucker Act, 28 U.S.C. §§1346(a)(2) and 1491, to recover just compensation. See Hurley v. Kincaid, 285 U.S. 95, 104 [52 S.Ct. 267, 76 L.Ed. 637]. Under the second procedure, the Government may either employ statutes which require it to pay over the judicially determined compensation * * * or proceed under other statutes which enable it to take immediate possession upon order of court before the amount of just compensation has been ascertained." [11]

It is respectfully submitted this holding that a claim must only be presented to the Court of Claims conflicts with Meyers v. United States, 323 F. 2d 580 (C.A. 9th Cir. 1963) holding all elements of damage are properly triable where the complaint in condemnation is filed.

3. The claim of the Petitioners belongs to the Petitioners and the mortgagee has no right or interest in and

to that claim. Freedman's Savings Company v. Shepherd, (supra) at Page 502.

We respectfully direct the Court's attention to the fact that the receiver did not take possession of the property until subsequent to the condemnation, and that he was discharged without seeking to receive or receiving the condemnation award as an asset with the consent of the mortgagee. Under these circumstances the mortgagee's interest being one for security only does not ripen to the point of ownership. Further the mortgagee has modified the mortgage, and accepted the new mortgagor without reservation of right and without the agreement or consent of the Petitioners, thus releasing any interest in any security interest in the claim owned by the claimant.

4. The Respondent, City Investing Company's claim at Page 9-10 of its Brief that the moving papers were not sufficient to raise a successful issue against the Motion For Summary Judgment, is plainly in error since on the very moving papers themselves, as pointed out in the Plaintiff's Petition for Certiorari, alleged that the parties had reached an agreement in which the rents only would be assigned to go along with the Deed, but that all other portions of the Condemnation award would be reserved to the Petitioners which was later confirmed in writing by the client, City Investing Company; the answering affidavit was set forth an admission by the Respondent City Investing Company. Under such circumstances a full, triable issue is raised.

The verified answer also raised an issue of economic duress in the execution of the assignment. (Appendix A, Page 13, see wherefor clause. Also Page 11, Paragraph 13)

5. Attached hereto as Appendix A to this Reply Brief is the Answer of the Petitioner which was part of the Record submitted to the Circuit Court.

Despite the statements in the Opposition Briefs, that

Answer makes it plain at Paragraphs 5 and 18 and 21 that by reason of a scattered taking and physical occupancy there was severe consequential damage to the remainder of the building, by reason of this consequential damage the Petitioner was unable to lease the floors.

This Court has previously recognized that the scattered taking of a leasehold by the Government can inflict such damage. (United States v. General Motors, 323 U.S. 373, 382). This is the damage which the Petitioner reserved and which was settled without its consent.

## III.

## CONCLUSION

It would be a miscarriage of justice to ignore the realities of the situation of an owner in possession whose chief tenant in full possession of the structure prior to the taking exerts its power of condemnation in a scattered basis reduces the revenue structure of the building with a following foreclosure.

A Deed in Lieu of Foreclosure and an assignment executed under such circumstances can hardly be described as voluntary or consential.

In the interests of justice as well as in the stability of law and the enforcement of the policy of Congress in regard to trafficking in assignments, the assignment should be disregarded, and the case reversed.

It is respectfully submitted that the issues in their present form before the Court raise clear questions of law in which Summary Reversal on the part of the Court would be in the interests of justice.

Respectfully submitted,

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## APPENDIX A — Answer.

(SAME TITLE).

1. Defendants, Walter J. Sampson, Bernard Greenbaum, Abner J. Mesirow, and Walter A. Bogeaus, co-partners doing business as Southeastern Industrial District, claim an interest as owners in the property known as the Chimes Building, 109 West Onondaga Street, Syracuse, Onondaga County, State of New York, and more particularly described as follows:

All that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the City of Syracuse, County of Onondaga, State of New York, and being part of Block 120 Syracuse, bounded and described as follows:

Beginning at a point on the westerly side of South Salina Street distant 214.33 feet northerly from the corner formed by the intersection of the westerly side of South Salina Street and the northerly side of West Adams Street; running thence South 72 degrees 28 minutes 00 seconds West 264.34 feet to the easterly side of South Clinton Street; thence along the easterly side of South Clinton Street North 17 degrees 31 minutes 00 seconds West 57.75 feet to the southerly side of the right of way; thence along the southerly side of the right of way North 72 degrees 28 minutes East 93.40 feet; North 71 degrees 14 minutes 50 seconds East 30 feet to the easterly side of said right of way; thence North 17 degrees 28 minutes 30 seconds West 51.9 feet to the northerly side of said right of way; thence along the northerly side of said right of way South 72 degrees 28 minutes West 30.48 feet; thence North 17 degrees 28 minutes 30 seconds West 83.10 feet to the southerly side of West Onondaga Street; thence along the southerly side of West Onondaga Street North 44 degrees 18 minutes 50 seconds East 194.80 feet to the corner formed by the intersection of the southerly side of West Onondaga Street and the

westerly side of South Salina Street; thence along the westerly side of South Salina Street South 17 degrees 28 minutes 30 seconds East 285.62 feet to the point or place of beginning.

2. Defendants respectfully urge the following objections and defenses to the taking of their property and their estate therein as aforesaid.

3. That the entire condemnation complaint is unreasonable, unrealistic and inequitable.

4. That prior to January 1, 1967, and for a period of approximately 20 years, under the terms of Government Lease No. WA6pb-6730, the United States Government occupied substantially all of the afore-described premises, in that of the 120,000 net usable square feet of commercial and office space therein, the United States Government occupied all except for approximately 4,000 net usable square feet leased to the Lincoln National Bank and Trust Co., a small penthouse leased to the Western Union Company, and 1,500 net usable square feet leased to Neugent Accountants.

5. That Schedule "A" of Plaintiff's complaint requests the condemnation of a part of the basement, together with the entire third, eighth, ninth and eleventh floors of the aforesaid twelve-floor property; and that it also comprehends the condemnation of two of the five elevators on the premises; that the haphazard taking of the third, eighth, ninth, and eleventh floors amounts to a virtual taking of the entire Chimes Building; and that such condemnation would render exceedingly difficult, if not impossible, the renting of the other, separated floors to any prospective tenant, and would have a substantially adverse effect upon the marketability of the premises.

6. That the United States Government should be required to condemn either the entire fee interest in the Chimes Building or the entire leasehold interest therein.

Appendix A - Answer.

AS A SECOND AND FURTHER OBJECTION AND DEFENSE

7. Defendants respectfully demonstrate the following facts to the Court:

8. That in February, 1966, the United States Government advertised in the Syracuse, New York area for bids on approximately 70,000 net usable square feet of office space to house those Government agencies which had previously been occupants of the Chimes Building as aforesaid; and that on March 16, 1966, Defendants made their initial offer in writing to the General Services Administration, offering the entire Chimes Building, except for the small penthouse, at a reasonably low rental, the Government to assume interior and exterior maintenance, and the payment of taxes and insurance; and in addition offering to negotiate the installation of major capital improvements; and further offering to negotiate the terms of the lease on a basis equitable to both parties.

9. That Defendants, acting in good faith, made the above offer to the Government, but the Government unilaterally rejected the same, stating, in part, that its needs were for only 80,000 net usable square feet of office space.

10. That subsequent to this time, and after a lengthy series of fruitless negotiations, Defendants again wrote to Plaintiff offering approximately 80,000 net usable square feet of office space to include the eight upper floors of the Chimes Building under a five year lease, the Government to maintain the premises; that such lease contemplated a complete renovation and redecoration by Defendants to include the installation of new heating, lighting and air conditioning systems along with other items; and that the other terms would be substantially similar to those under which the Government's then current lease with Defendants operated.

11. That the above offer was imminently reasonable,

taking into consideration the major capital improvements contemplated by Defendants, and taking into consideration the fact that it represented but a slight rise over that rental set by Plaintiff and Defendants over twenty years earlier.

12. That at the same time, and as one alternative to the above proposed lease, Defendants gave the Government the option of having Defendants assume the operation of the building, at a small fixed increase in price; and that as a further alternative, Defendants offered to lease the entire Chimes Building to the Government for a period of two years, at a rental of only 10% more than that set between the parties in 1946.

13. That subsequent to this, and on November 17, 1966, faced not only with the prospect of losing their tenant of approximately 97% of the premises, but faced with substantial amounts of monthly tax, insurance and mortgage payments as well, and having notified the Government of the urgency of their position, Defendants offered to lease 80,000 net usable square feet of office space to the Government for six months at a rental, again approximately 10% more than that set between the parties in 1946, based upon square feet of occupancy.

14. That on November 28, 1966, Plaintiff, knowing of Defendants' precarious financial condition as concerns the above-mentioned premises, claimed to need only 30,000 net usable square feet of office space; and that finally, in its Condemnation Complaint filed December 29, 1966, Plaintiff demanded almost 50,000 net usable square feet.

15. That throughout the latter portion of its negotiations with Defendants, the plaintiff used the imminent "possibility" of condemnation as an instrument of negotiation; and that the Government should not be allowed to do by condemnation what it could not do through good faith negotiation.

AS A THIRD AND FURTHER OBJECTION AND DEFENSE

16. Defendants respectfully point out to the Court that the provisions relating to the term of the lease in condemnation are arbitrary, harsh, impractical and imminently unfair.

17. That Plaintiff has demanded the right to occupy the premises in question for a six-month term, extendible for another six months upon only thirty days notice; that Plaintiff has demanded the right to terminate upon thirty days notice at any time, even during the initial six-month term; and that Plaintiff has demanded, along with the right to remove at any time upon thirty days notice, that it be given a "reasonable time" to remove, with no realistic limits set thereon.

18. That the Chimes Building is a valuable office building located at a five-corner intersection in the heart of downtown Syracuse, New York; that because of the character and location of the premises, it would naturally demand a substantial rental on the open market; and that prospective tenants, faced with such a rental would be most unlikely to agree to it when their date of occupancy is so entirely unpredictable.

AS A FOURTH AND FURTHER OBJECTION AND DEFENSE

19. Defendants respectfully point out to the Court, that Plaintiff was fully apprised of Defendants' financial difficulties arising out of the proposed condemnation; and that despite this, Plaintiff has made no provision in its Condemnation Complaint for a deposit to be made into Court.

20. That such deposit is essential to enable Defendants to meet their daily and monthly financial obligations for mortgage payments, insurance, taxes, etc.; that the amount of such deposit should, in no event, be less than $75,000.

AS A FIFTH AND FURTHER OBJECTION AND DEFENSE

21. Defendants respectfully point out to the Court that Plaintiff is presently occupying more of the premises than its Condemnation Complaint would indicate, in that Government agencies are still occupying certain portions of the first, fifth and twelfth floors; and that in this respect, the Condemnation Complaint is inaccurate and misleading.

WHEREFORE, since the Government, as shown above, has, by this condemnation, placed Defendants ownership in a position of imminent disaster, Defendants respectfully urge a reformation of the Condemnation Complaint:

1.) That the entire Chimes Building be condemned either by a taking of the fee or the entire leasehold interest therein; and

2.) That if the taking is of the leasehold interest, the period of taking should be definite and certain and for a period of not less than one year; and

3.) That upon termination, the Government should be required to remove itself from the premises forthwith, and in any event not later than 30 days after the effective date of termination; and

4.) That the Government be required immediately to deposit with Defendants, a sum of not less than $75,000 to be applied against any and all damages arising from the taking, whether it be of the fee or the leasehold interest;

together with such other and further relief as to the Court seems justified and proper.

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